

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**

---

State of Oklahoma,	)	05-CV-0329-GKF-PJC
	)	
	)	
Plaintiff,	)	
v.	)	<b>DEFENDANTS' SUPPLEMENTAL</b>
	)	<b>BRIEF REGARDING FOUNDATIONAL</b>
Tyson Foods, Inc., et al.,	)	<b>REQUIREMENTS FOR RULE 1006</b>
	)	<b>SUMMARY EXHIBITS</b>
Defendants.	)	
	)	

---

Defendants offer the following discussion of the requirements for admission of summaries and charts under Federal Rule of Evidence 1006. As this Court noted during the hearings on motions in limine, “[s]ummary exhibits are very helpful, provided they have proper foundation, proper support.” (Sept. 16, 2009 Hrg. Tr. at 30:5-7: Dkt. No. 2643; see also id. at 29:24 – 30:2: “And I’m going take a close look, if this matter is tried to me, to make sure that all summary exhibits have the proper foundation. We’re just not going to allow junk in.”)

Application of the Rule 1006 analysis cannot be performed in a vacuum, but will depend on the specifics of the summary document offered. Defendants present this submission to provide a context for Defendants’ possible objections and/or requests for voir dire when and if the State seeks to offer improper Rule 1006 exhibits.

**DISCUSSION**

The text of Rule 1006 is exacting:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. **The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.**

Fed. R. Evid. 1006 (emphasis added). “A proper foundation for such a summary can be laid

through the testimony of the witness who supervised preparation of the exhibit.” United States v. Behrens, 689 F.2d 154, 161 (10th Cir. 1982).

As Federal Practice and Procedure instructs, “[t]he word ‘shall’ means that, as a condition to the admission of summary evidence, the proponent of that evidence must show that it made the source materials reasonably available. The purpose of this is to give the other parties a chance to detect inaccurate summaries and prepare to prove the inaccuracies.” Wright & Gold, 31 Fed. Prac. & Proc. Evid. § 8045 (2009); see also United States v. Bray, 139 F.3d 1104, 1109 (6th Cir. 1998) (“The purpose of this requirement is to provide the opposing party who desires to attack the authenticity or accuracy of a chart, summary, or calculation, with an opportunity to prepare for cross-examination ....”) (citing Weinstein’s Federal Evidence). Courts routinely exclude 1006 exhibits offered by a party who failed to actually make available the source documents. See, e.g., Powell v. Penhollow, 260 Fed. Appx. 683, 688 (5th Cir. 2007) (collecting cases from across the country); Designing Health, Inc. v. Erasmus, 132 Fed. Appx. 826, 833 (Fed. Cir. 2005) (citing Amarel v. Connell, 102 F.3d 1494, 1516 (9th Cir. 1997)); Air Safety v. Roman Catholic Archbishop, 94 F.3d 1, 8 (1st Cir. 1996); AEL Indus. v. Loral Fairchild Corp., 882 F. Supp. 1477, 1488 (E.D. Pa. 1995); Am. Pride Petroleum, Inc. v. Marathon Petroleum Co., 2009 U.S. Dist. LEXIS 36556, at \*5-7 (E.D. Ky. Apr. 29, 2009). This exclusionary rule applies even if the underlying documents cannot be provided. Hackett v. Housing Auth. of San Antonio, 750 F.2d 1308, 1312 (5th Cir. 1985) (finding trial court erred in error admitting summary under Rule 1006 where proponent failed to produce underlying documents, even though documents could not be provided because they no longer existed).

In this same vein, the Tenth Circuit has recognized at least three separate preconditions to Rule 1006 admissibility, all of which hinge on the opposing party’s ability to examine all the

underlying source materials so as to ascertain, among other things, the admissibility of all the foundational documents and the complete accuracy and meaning of the summary or chart.

First, the proponent of the 1006 exhibit carries the burden to show that the foundational materials of the summary are themselves fully admissible. United States v. Samaniego, 187 F.3d 1222, 1224 (10th Cir. 1999). A Rule 1006 “summary of records may be properly admitted into evidence *provided all* of the records from which it is drawn are otherwise admissible.” Vasey v. Martin Marietta Corp., 29 F.3d 1460, 1469 (10th Cir. 1994) (emphasis added); United States v. Schuler, 458 F.3d 1148, 1153 (10th Cir. 2006) (same). Because of the complete admissibility requirement, summaries may not contain any hearsay or other inadmissible components. “A contrary result would inappropriately provide litigants with a means of avoiding rules governing the admission of evidence such as hearsay.” Samaniego, 187 F.3d at 1224 (reversing and remanding where district court erred by not requiring offering party to lay foundation to show admissibility of source materials for 1006 summaries, which contained hearsay). Per the plain language of Rule 1006, the proponent must make available all the underlying source material, in part so that the responding party has the opportunity to test the admissibility of the source materials.

As a second precondition to 1006 admissibility, the Tenth Circuit holds that “care must be taken to insure the summaries accurately reflect the contents of the underlying documents.” Vasey, 29 F.3d at 1469 (citations omitted); accord Wright & Gold, 31 Fed. Prac. & Proc. Evid. § 8044 (2009) (“Whatever the form of Rule 1006 evidence, the proponent must show that it accurately summarizes the source materials. .... [A] summary [must] fairly represent[] the contents of the source materials.”) (citations omitted). Applying this accuracy inquiry, the Vasey court upheld exclusion of a 1006 summary where the offering party failed to adequately explain

the contents of relevant portions of a summary such that “the district court was unable to assure itself of the accuracy of the information contained therein.” 29 F.3d at 1469; cf., United States v. Thompson, 518 F.3d 832, 859 (10th Cir. 2008) (upholding admission of 1006 summaries where “[e]ach item listed ... was supported by at least one piece of evidence” and a particular exhibit “listed all of the items in painstaking detail, cross-referencing to each specific exhibit number.”)

Third, to be admissible, 1006 “[s]ummaries must be ... nonprejudicial.” Daniel v. Ben E. Keith Co., 97 F.3d 1329, 1335 (10th Cir. 1996); see also Silva v. Goodwill Indus. of N.M., Inc., 2000 U.S. App. LEXIS 6454, at \*8 (10th Cir. Apr. 7, 2000) (unpublished) (same). The Sixth Circuit – along with several courts of appeal – also applies the “nonprejudicial,” requirement and has explained that this means “first that the information on the document summarizes the information contained in the underlying documents accurately, correctly, and in a nonmisleading manner.” Bray, 139 F.3d at 1110; accord Wright & Gold, 31 Fed. Prac. & Proc. Evid. § 8044 (“evidence may be inadmissible under Rule 1006 if it omits important aspects of the voluminous source materials, adds matters not present in those materials, or otherwise significantly mischaracterizes the contents.”). Hence, a 1006 exhibit may not characterize or opine – it can only summarize voluminous records. For instance, the Tenth Circuit has rejected purported 1006 “summaries” containing projections of future lost profits. The court found that the projections were “not legitimately admissible as summaries under Rule 1006, since they are interpretations of past data and projections of future events, not a simple compilation of voluminous records.” State Office Systems, Inc. v. Olivetti Corp. of Am., 762 F.2d 843, 845-86 (10th Cir. 1985).

Dated: October 13, 2009.

Respectfully submitted,

BY: /s/ John H. Tucker  
JOHN H. TUCKER, OBA #9110  
COLIN H. TUCKER, OBA #16325  
THERESA NOBLE HILL, OBA #19119  
RHODES, HIERONYMUS, JONES,  
TUCKER & GABLE, PLLC  
100 W. Fifth Street, Suite 400 (74103-4287)  
P.O. Box 21100  
Tulsa, Oklahoma 74121-1100  
(918) 582-1173  
(918) 592-3390 Facsimile  
-and-  
DELMAR R. EHRICH  
BRUCE JONES  
KRISANN C. KLEIBACKER LEE  
FAEGRE & BENSON LLP  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402  
(612) 766-7000  
(612) 766-1600 Facsimile  
**ATTORNEYS FOR CARGILL, INC. AND CARGILL  
TURKEY PRODUCTION LLC**

BY: /s/ Michael Bond  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)  
MICHAEL BOND, AR Bar No. 2003114  
ERIN WALKER THOMPSON, AR Bar No.  
2005250  
DUSTIN DARST, AR Bar No. 2008141  
KUTAK ROCK LLP  
234 East Millsap Road Suite 400  
Fayetteville, AR 72703-4099  
Telephone: (479) 973-4200  
Facsimile: (479) 973-0007  
-and-

STEPHEN L. JANTZEN, OBA No. 16247  
PATRICK M. RYAN, OBA No. 7864  
PAULA M. BUCHWALD, OBA No. 20464  
RYAN, WHALEY & COLDIRON, P.C.  
119 N. Robinson  
900 Robinson Renaissance  
Oklahoma City, OK 73102  
Telephone: (405) 239-6040  
Facsimile: (405) 239-6766  
E-Mail: sjantzen@ryanwhaley.com

-and-

THOMAS C. GREEN  
MARK D. HOPSON  
TIMOTHY K. WEBSTER  
JAY T. JORGENSEN  
GORDON D. TODD  
CARA R. VIGLUCCI LOPEZ  
SIDLEY AUSTIN LLP  
1501 K Street, N.W.  
Washington, D.C. 20005-1401  
Telephone: (202) 736-8000  
Facsimile: (202) 736-8711

-and-

ERIK J. IVES  
SIDLEY AUSTIN LLP  
One South Dearborn  
Chicago, IL, 60603  
Telephone: (312) 853-7067  
Facsimile: (312) 853-7036

**ATTORNEYS FOR TYSON FOODS, INC.;  
TYSON POULTRY, INC.; TYSON CHICKEN,  
INC; AND COBB-VANTRESS, INC.**

BY: /s/ A. Scott McDaniel  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)  
A. SCOTT MCDANIEL, OBA 16460  
NICOLE LONGWELL, OBA 18771  
PHILIP D. HIXON, OBA 19121  
McDaniel, Hixon, Longwell & Acord, PLLC  
320 S. Boston Avenue, Suite 700  
Tulsa, OK 74103  
-and-

SHERRY P. BARTLEY, AR BAR #79009  
MITCHELL WILLIAMS, SELIG,  
GATES & WOODYARD, PLLC  
425 W. Capitol Avenue, Suite 1800  
Little Rock, AR 72201  
**ATTORNEYS FOR PETERSON FARMS, INC.**

BY: /s/ Randall E. Rose  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)  
RANDALL E. ROSE, OBA #7753  
GEORGE W. OWENS, ESQ.  
OWENS LAW FIRM, P.C.  
234 W. 13 Street  
Tulsa, OK 74119  
-and-  
JAMES MARTIN GRAVES, ESQ.  
GARY V. WEEKS, ESQ.  
WOODY BASSETT, ESQ.  
VINCENT O. CHADICK, ESQ.  
K.C. DUPPS TUCKER, ESQ.  
BASSETT LAW FIRM  
POB 3618  
Fayetteville, AR 72702-3618  
**ATTORNEYS FOR GEORGE'S, INC. AND  
GEORGE'S FARMS, INC.**

BY: /s/John R. Elrod  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)  
JOHN R. ELROD  
VICKI BRONSON, OBA #20574  
BRUCE WAYNE FREEMAN  
CONNER & WINTERS, L.L.P.  
100 W. Central Street, Suite 200  
Fayetteville, AR 72701  
**ATTORNEYS FOR SIMMONS FOODS, INC.**

BY: /s/ Robert P. Redemann  
(SIGNED BY FILING ATTORNEY WITH  
PERMISSION)  
ROBERT P. REDEMANN, OBA #7454  
WILLIAM D. PERRINE, OBA #11955  
LAWRENCE W. ZERINGUE, ESQ.  
DAVID C. SENGER, OBA #18830  
GREGORY A. MUEGGENBORG, OBA #7454  
PERRINE, MCGIVERN, REDEMANN, REID,  
BARRY & TAYLOR, P.L.L.C.  
Post Office Box 1710  
Tulsa, OK 74101-1710  
-and-  
ROBERT E. SANDERS  
STEPHEN WILLIAMS  
YOUNG, WILLIAMS, HENDERSON &  
FUSILIER  
Post Office Box 23059  
Jackson, MS 39225-3059  
**ATTORNEYS FOR CAL-MAINE FOODS,  
INC.**

**CERTIFICATE OF SERVICE**

I certify that on the 13th day of October, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and a true and correct copy of the foregoing was sent via separate email to the following:

W. A. Drew Edmondson, Attorney General	<a href="mailto:drew_edmondson@oag.state.ok.us">drew_edmondson@oag.state.ok.us</a>
Kelly Hunter Burch, Assistant Attorney General	<a href="mailto:kelly_burch@oag.state.ok.us">kelly_burch@oag.state.ok.us</a>
J. Trevor Hammons, Assistant Attorney General	<a href="mailto:trevor_hammons@oag.state.ok.us">trevor_hammons@oag.state.ok.us</a>
Daniel Lennington, Assistant Attorney General	<a href="mailto:Daniel.lennington@oag.ok.gov">Daniel.lennington@oag.ok.gov</a>
Melvin David Riggs	<a href="mailto:driggs@riggsabney.com">driggs@riggsabney.com</a>
Joseph P. Lennart	<a href="mailto:jlennart@riggsabney.com">jlennart@riggsabney.com</a>
Richard T. Garren	<a href="mailto:rgarren@riggsabney.com">rgarren@riggsabney.com</a>
Sharon K. Weaver	<a href="mailto:sweaver@riggsabney.com">sweaver@riggsabney.com</a>
Robert Allen Nance	<a href="mailto:rnance@riggsabney.com">rnance@riggsabney.com</a>
Dorothy Sharon Gentry	<a href="mailto:sgentry@riggsabney.com">sgentry@riggsabney.com</a>
David P. Page	<a href="mailto:dpage@riggsabney.com">dpage@riggsabney.com</a>
Riggs Abney Neal Turpen Orbison & Lewis, P.C.	
Louis W. Bullock	<a href="mailto:lbullock@mkblaw.net">lbullock@mkblaw.net</a>
J. Randall Miller	<a href="mailto:rmiller@mkblaw.net">rmiller@mkblaw.net</a>
Miller Keffer & Bullock Pedigo LLC	



William H. Narwold  
Frederick C. Baker  
Lee M. Heath  
Elizabeth Claire Xidis  
Fidelma L Fitzpatrick  
Mathew P. Jasinski  
Motley Rice LLC  
**COUNSEL FOR PLAINTIFFS**

[bnarwold@motleyrice.com](mailto:bnarwold@motleyrice.com)  
[fbaker@motleyrice.com](mailto:fbaker@motleyrice.com)  
[lheath@motleyrice.com](mailto:lheath@motleyrice.com)  
[cxidis@motleyrice.com](mailto:cxidis@motleyrice.com)  
[ffitzpatrick@motleyrice.com](mailto:ffitzpatrick@motleyrice.com)  
[mjasinski@motleyrice.com](mailto:mjasinski@motleyrice.com)

A. Diane Hammons  
Attorney General, Cherokee Nation  
Sara E. Hill  
**COUNSEL FOR INTERVENER, CHEROKEE NATION**

[diane-hammons@cherokee.org](mailto:diane-hammons@cherokee.org)  
[sara-hill@cherokee.org](mailto:sara-hill@cherokee.org)

R. Thomas Lay  
Kerr, Irvine, Rhodes & Ables

[rtl@kiralaw.com](mailto:rtl@kiralaw.com)

Jennifer S. Griffin  
Lathrop & Gage, L.C.  
**COUNSEL FOR WILLOW BROOK FOODS, INC.**

[jgriffin@lathropgage.com](mailto:jgriffin@lathropgage.com)

Michael D. Graves  
Dale Kenyon Williams, Jr.  
**COUNSEL FOR CERTAIN POULTRY GROWERS**

[mgraves@hallestill.com](mailto:mgraves@hallestill.com)  
[kwilliams@hallestill.com](mailto:kwilliams@hallestill.com)

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

Thomas C. Green  
Sidley Austin Brown & Wood LLP  
1501 K Street NW  
Washington, DC 20005  
**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.;  
AND COBB-VANTRESS, INC.**

s/ John H. Tucker